

Pandey (Migration) [2021] AATA 2253 (3 June 2021)

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DECISION RECORD

DIVISION:	Migration & Refugee Division
APPLICANTS:	Mrs Sanjita Pandey Mr Indra Bhusal
CASE NUMBER:	1924781
HOME AFFAIRS REFERENCE(S):	BCC2019/2344968 PNJ
MEMBER:	David Barker
DATE:	3 June 2021
PLACE OF DECISION:	Sydney
DECISION:	The Tribunal remits the applications for Student (Temporary) (Class TU) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 500 (Student) visas: • Public Interest Criterion 4020 for the purposes of cl 500.217 of Schedule 2 to the Regulations

Statement made on 03 June 2021 at 2:47pm

CATCHWORDS

MIGRATION – Student (Temporary) (Class TU) visa – Subclass 500 (Student) – bogus document – false or misleading information in visa application – applicant included as dependent in a previous tourist visa application – migration agent’s error – no deliberate fraud or deception – decision under review remitted

LEGISLATION

*Migration Act 1958, ss 5(1), 65
Migration Regulations 1994, Schedule 2 cls 500.217, 500.311; Schedule 4 Public Interest Criterion 4020; r 1.12*

CASES

*Arora v MIBP [2016] FCAFC 35
Batra v MIAC [2013] FCA 274*

Trivedi v MIBP [2014] FCAFC 42

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

4. This is an application for review of a decision made by a delegate of the Minister for Home Affairs on 9 August 2019 to refuse to grant the applicants Student (Temporary) (Class TU) visas under s 65 of the *Migration Act 1958* (Cth) (the Act).
5. The applicants applied for the visas on 1 May 2019. The delegate refused to grant the visas on the basis that the first named applicant (the applicant) did not satisfy the requirements of cl 500.217 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations) because required public interest criteria were not met because the delegate found false or misleading information was provided in relation the current visa application.
6. The applicants appeared before the Tribunal by teleconference on 28 April 2021 to give evidence and present arguments. The Tribunal also received oral evidence from Mr Shishir Nepal. The Tribunal hearing was conducted with the assistance of an interpreter in the Nepali and English languages.
7. The applicants were represented in relation to the review.
8. For the following reasons, the Tribunal has concluded that the matter should be remitted for reconsideration.

9. BACKGROUND

10. The applicant is a national of Nepal and is 24 years of age. She came to Australia on a Subclass 500 Student visa on 4 February 2017, which was valid until 4 May 2019. Her husband, the second named applicant, is in Nepal.
11. The decision record of the delegate, a copy of which was provided with the review application, indicates that the applicant, on 1 May 2019, applied for a Student (Subclass 500) visa. As part of their processing of the application, the Department, on 16 July 2019 sent the applicant's migration agent a natural justice letter, giving the applicant a 28-day period to respond to that letter. This letter noted the applicant had declared 'No' to the following question under 'Visa History': - *Has the applicant, or any person included in this application, ever had an application for entry or further stay in Australia or any other country refused, or had a visa cancelled?*
12. The delegate noted that the natural justice letter invited the applicant to comment on unfavourable information which did not support her application, namely that Departmental systems indicate that the dependant included in this application, BHUSAL, INDRA (date of birth 29 June 1992), applied for a Tourist Stream (Offshore) FA600 visa on 14 November 2018, which application was refused on 30 November 2018. The natural justice letter from the department indicated it appeared the applicant may fail to satisfy the criteria in PIC 4020(1). The Department invited the applicant to comment on this issue and as to whether the applicant would meet the exception for the waiver of that requirement.
13. In response to this natural justice letter the applicant's migration agent, on 18 July 2019, provided the Department with a Form 1023 Notification of incorrect answer stating amongst other things that an incorrect answer had been provided to the question: *Has the applicant, or any person included in this application, ever had an application for entry or further stay in Australia or any other country refused, or had a visa cancelled?* information supplied on the form stated that the correct answer was *YES, refused Australia Visitor Visa on 30th*

November 2018, citing the reason for the incorrect information was Migration Agent Human Error.

14. Further to the Form 1023, the Department received written statement from the applicant and a further written statement which essentially reiterated the information contained in the Form 1023, namely that the migration agent had mistakenly answered the question about the applicant's husband's (the second named applicant) visa history on the applicant's Student visa application and confirming that the second named applicant was refused a Tourist visa on 30 November 2018.
15. Based on their consideration of the issues, the delegate found that the applicant had provided information that was false or misleading in a material particular. Accordingly, the delegate concluded that the applicant did not meet the criteria in PIC 4020(1).
16. The delegate noted no information had been submitted by the applicant indicating she was seeking a waiver of PIC 4020(1). Accordingly, the delegate was not satisfied that there were compelling circumstances affecting the interests of Australia, or compassionate or compelling circumstances affecting the interests of an Australian citizen, Australian permanent resident, or an eligible New Zealand citizen that justify the granting of the visa.
17. The delegate found that the applicants did not meet the criteria in PIC 4020 and therefore did not satisfy cl.500.217 for the grant of the visas.
18. Prior to the hearing the applicant provided the Tribunal with a further written statement, records of interactions with her previous migration agent, Mr Shishir Nepal, in relation to the reasons for the rejection of her student visa application and evidence as to her academic studies and employment in Australia.

CONSIDERATION OF CLAIMS AND EVIDENCE

19. The issue in this review is whether the visa applicant meets Public Interest Criterion 4020 (PIC 4020) as required by cl 500.217 for the grant of the visa. Broadly speaking, this requires that:
 - there is no evidence that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal, a relevant assessing authority, or Medical officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to the application for the visa or a visa that the applicant held in the 12 months before the application was made: PIC 4020(1); and
 - the applicant and each member of the family unit has not been refused a visa because of a failure to satisfy PIC 4020(1) during the period starting 3 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2) and (2AA); and
 - the applicant satisfies the Minister as to his or her identity: PIC 4020(2A); and
 - neither the applicant nor any family unit member has been refused a visa because of a failure to satisfy PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused, unless the applicant was under 18 at the time the application for the refused visa was made: PIC 4020(2B) and (2BA).

20. The requirements in PIC 4020(1) and (2) can be waived if there are certain compelling or compassionate reasons justifying the granting of the visa: PIC 4020(4). However, this waiver does not apply to the identity requirements in PIC 4020(2A) and (2B). PIC 4020 is extracted in the attachment to this decision.

Has the applicant given, or caused to be given a bogus document, or information that is false or misleading in material particular?

21. The term 'information that is false or misleading in a material particular' is defined in PIC 4020(5) and the term 'bogus document' is defined in s 5(1) of the Act (see the attachment to this decision). In contrast to the definition of 'information that is false or misleading in a material particular' in PIC 4020(5), the reference in the definition of bogus document to a document that was obtained because of a 'false or misleading' statement has no requirement that it be relevant to a criterion for the grant of the visa: *Arora v MIBP* [2016] FCAFC 35; *Batra v MIAC* [2013] FCA 274.
22. The requirement in PIC 4020(1) not to provide a bogus document, or false or misleading information, applies whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant: PIC 4020(3). It also applies whether or not the document or information was provided by the applicant knowingly or unwittingly.
23. While PIC 4020 refers to information that is false, in the sense of purposely untrue, it is not necessary for the Minister (or the Tribunal on review) to conclude that the applicant was aware the information was purposely untrue in order for PIC 4020 to be engaged. However, an element of fraud or deception by some person is necessary to attract the operation of the provision: *Trivedi v MIBP* [2014] FCAFC 42.
24. The Tribunal has considered the oral evidence provided at hearing by the applicant and witness, as well as the written submissions from the applicant and other documents available in the department and Tribunal files.
25. In this matter the applicant concedes that an incorrect response was provided on her visa application, as detailed in the delegate's decision. It is her contention that the incorrect response, which failed to disclose her husband's past unsuccessful application for a Tourist visa, was provided by mistake, by the migration agent who assisted both the applicant with her visa application, but also her partner in relation to his unsuccessful Tourist visa application. The applicant contends that there was no attempt to deceive or mislead the Department, either by her, or the migration agent who had assisted her prepare the visa application. In support of these contentions she has provided a letter from the agent, Mr Shishir Nepal, dated 18 July 2019, which corroborates the contentions of the applicant with respect to his providing assistance in relation to the two visa applications and for failing to answer the identified question correctly. Mr Nepal states that he has updated the visa application and apologises for his human error. The Tribunal contacted Mr Nepal during the hearing, at which time he confirmed the accuracy of information in his letter dated 18 July 2019 and emphasised that he had no intention to deceive the Department, as he was well aware of the implications if an applicant was found to have provided false and misleading information in their visa application.
26. On the basis of the evidence before it, the Tribunal finds the applicant applied for a Subclass 500 student visa, on 1 May 2019, which contained an incorrect responses in relation to whether the applicant, or any person included in this application, ever had an application for entry or further stay in Australia or any other country refused, or had a visa cancelled? The incorrect answer to this question was "No", as the husband of the applicant ,

the second named applicant, was refused a subclass 600 Tourist visa on 14 November 2018.

27. The Tribunal accepts the visa application lodged on 1 May 2019 was prepared with assistance from , Mr Shishir Nepal and considers the applicant to have displayed a degree of negligence in not more closely checking the application before allowing it to be lodged on her behalf. Negligence does not however equate to deliberate fraud or deception on the part of the applicant and I am not satisfied that the actions of , Mr Shishir Nepal in preparing the application without sufficient diligence or attention to detail demonstrates the necessary dishonest intention to be viewed in this light either.
28. In considering whether the incorrect response and declarations on the visa application form is information that is false, in the sense of purposely untrue, I am not persuaded this is the case in the particular circumstances of this matter. Whilst it is correct the applicant wished to maintain her studies and to have her husband join her, this does not in itself establish she in some way influenced Mr Nepal to purposefully misrepresent her husband's migration history on her student visa application. I consider a more plausible and reasonable explanation to be human error on the part of Mr Nepal.
29. The Tribunal is of the view that the in the circumstances of this case, the incorrect response on the visa application does not have the purposely untrue, deceptive and dishonest character to be regarded as false and misleading. The Tribunal finds that there is therefore not evidence that the applicant has given, or caused to be given, to the Minister or an officer, 'information that is false or misleading in a material particular' in relation to the application for a Subclass 500 student visa, lodged on 1 May 2019. The Tribunal is satisfied the incorrect response to the question of whether the applicant, or any person included in the visa application, ever had an application for entry or further stay in Australia or any other country refused, or had a visa cancelled was not intended to deceive in any way. The Tribunal finds that the applicant therefore did not provide false or misleading information to the Department.
30. The Tribunal has considered whether the visa application form submitted by the applicant on 1 May 2019 could be regarded as a 'bogus document', as defined in s 5(1). In considering this issue the Tribunal is not persuaded the visa application is a document that purports to have been, but was not, issued in respect of the person, or is counterfeit or has been altered by a person who does not have authority to do so, or was obtained because of a false or misleading statement, whether or not made knowingly. The Tribunal is satisfied that the visa application is not therefore a bogus document.
31. Therefore, the applicant meets PIC 4020(1).
32. **Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(1)?**
33. PIC 4020(2) requires the Tribunal to be satisfied that the applicant and each member of the family unit have not been refused a visa because of a failure to satisfy PIC 4020(1) in the period commencing 3 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2AA).
34. There is no evidence before the Tribunal to demonstrate that the applicant or any member of his family unit (as defined in reg 1.12) have been refused a visa in the relevant period because of a failure to satisfy PIC 4020(1).
35. Therefore, PIC 4020(2) is met.

36. Has the applicant satisfied the identity requirements?

37. PIC 4020(2A) requires an applicant satisfy the Tribunal as to his or her identity. There is no evidence before the Tribunal to suggest that there is an issue with the applicant's identity. Therefore, the applicant meets PIC 4020(2A).

38. Has a visa previously been refused on the basis of a failure to satisfy PIC 4020(2A)?

39. PIC 4020(2B) requires that neither the applicant nor any family unit member have been refused a visa because of a failure to satisfy the identity requirements in PIC 4020(2A) during the period starting 10 years before the application was made and ending when the visa is granted or refused. This requirement does not apply to a person who was under 18 at the time the application for the refused visa was made: PIC 4020(2BA).
40. There is no evidence the applicant or any member of the family unit (as defined in r.1.12) have been refused a visa in the relevant period because of a failure to satisfy cl.4020(2A).
41. Therefore cl.4020(2B) is met.
42. On the basis of the above, the applicant does satisfy PIC 4020 for the purposes of cl.500.217.

43. The second named visa applicant

44. As the Tribunal has determined the primary visa applicant satisfies the criteria in cl.500.217, other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
45. 'Member of a family unit' is relevantly defined at r. 1.12, which provides:

Reg 1.12 Member of the family unit

- (1) For the definition of member of the family unit in subsection 5(1) of the Act, and subject to subregulations (2), (2A), (6) and (7), a person is a member of the family unit of another person (in this subregulation called the family head) if the person is:
- (a) a spouse or de facto partner of the family head; or
 - (b) a dependent child of the family head or of a spouse or de facto partner of the family head; or
 - (c) a dependent child of a dependent child of the family head or of a spouse or de facto partner of the family head; or
 - (e) a relative of the family head or of a spouse or de facto partner of the family head who:
 - (i) does not have a spouse or de facto partner; and
 - (ii) is usually resident in the family head's household; and
 - (iii) is dependent on the family head.

46. As discussed in previous sections of this decision record, the Tribunal accepts that the second named visa applicant is married to the primary applicant. In making this finding the Tribunal notes that the Department file contains a copy of a marriage registration certificate of the primary visa applicant and the second named visa applicant.
47. The Tribunal has found the applicant satisfies PIC 4020. The Tribunal notes that an assessment by the Department as to whether the second named applicant satisfies cl 500.311 in Schedule 2 to the Regulations would flow from the outcome of their findings in relation to whether the applicant satisfies other required Public Interest Criteria in order for her to satisfy cl 500.217.

48. Given the above findings, the appropriate course is to remit the applications for the visas to the Minister to consider the remaining criteria for Subclass 500 (Student) visas.

DECISION

49. The Tribunal remits the applications for Student (Temporary) (Class TU) visas for reconsideration, with the direction that the first named applicant meets the following criteria for Subclass 500 (Student) visas:
- Public Interest Criterion 4020 for the purposes of cl 500.217 of Schedule 2 to the Regulations

David Barker
Member

ATTACHMENT

Migration Regulations 1994

Schedule 4

- 4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Tribunal during the review of a Part 5 reviewable decision, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:
- (a) the application for the visa; or
 - (b) a visa that the applicant held in the period of 12 months before the application was made.
- (2) The Minister is satisfied that during the period:
- (a) starting 3 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- the applicant and each member of the family unit of the applicant has not been refused a visa because of a failure to satisfy the criteria in subclause (1).
- (2AA) However, subclause (2) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (2A) The applicant satisfies the Minister as to the applicant's identity.
- (2B) The Minister is satisfied that during the period:
- (a) starting 10 years before the application was made; and
 - (b) ending when the Minister makes a decision to grant or refuse to grant the visa;
- neither the applicant, nor any member of the family unit of the applicant, has been refused a visa because of a failure to satisfy the criteria in subclause (2A).
- (2BA) However, subclause (2B) does not apply to the applicant if, at the time the application for the refused visa was made, the applicant was under 18.
- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.
- (4) The Minister may waive the requirements of any or all of paragraphs (1)(a) or (b) and subclause (2) if satisfied that:
- (a) compelling circumstances that affect the interests of Australia; or
 - (b) compassionate or compelling circumstances that affect the interests of an Australian citizen, an Australian permanent resident or an eligible New Zealand citizen;
- justify the granting of the visa.
- (5) In this clause:
- information that is ***false or misleading in a material particular*** means information that is:
- (a) false or misleading at the time it is given; and
 - (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.

...

Migration Act 1958

s 5 Interpretation

(1) In this Act, unless contrary intention appears:

...

bogus document, in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) purports to have been, but was not, issued in respect of the person; or
- (b) is counterfeit or has been altered by a person who does not have authority to do so; or
- (c) was obtained because of a false or misleading statement, whether or not made knowingly.

...